No. 9905

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RAYMOND H. JEHL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellee respectfully petitions this Court for a rehearing in this case, following decision entered on April 21, 1942, in which this Court, through Haney, J., and Mathews, J., with Stephens, J., dissenting, held that the record disclosed no evidence directly or indirectly showing participation or knowledge, on the part of the appellant, with the activities of appellant's co-defendants, nor with the operation of the still referred to in the indictment, or any still, illicit or otherwise.

We have carefully considered the opinion rendered in this case by the learned Circuit Court. We have reached the conclusion that for the reasons hereinafter

stated the opinion is erroneous and in conflict with, and contrary to the evidence as reflected in the record.

Paragraph 3 of page 2 of the opinion of the learned Court is as follows:

> "The evidence said to show appellant's connection with the conspiracy and the operation of the still consists of testimony to the effect that on six occasions sugar was sold to appellant by a grocer in Watsonville, California, that portions of such sugar were delivered by the grocer to appellant and that portions thereof were delivered by the grocer to appellant's co-defendants, but there is no evidence indicating that said sugar was used at or in connection with, or that it was purchased for, the still referred to in the indictment, or any other still, illicit or otherwise."

It is respectfully submitted that such statement does not reflect the record, which on the contrary shows the evidence to be:

(1) That appellant made arrangements to purchase sugar in ten sack lots at a price in excess of the regular market price (Transcript, p. 33).

(2) That about three weeks later, appellant placed an order for ten sacks of sugar, and said that someone would pick it up. Subsequently, a day or so later, Rodrigues picked the sugar up (Transcript, pp. 33, 34).

(3) That on at least six occasions appellant ordered the sugar, which later would be picked up by Rodrigues, and on one occasion by Woodworth (Transcript, pp. 33, 34, 35).

(4) That on three occasions appellant paid for the sugar, and on three occasions Rodrigues paid for the sugar, but that on all of the occasions appellant had ordered the sugar, and that when Rodrigues paid for the sugar it had already been ordered by appellant (Transcript, pp. 34, 35).

(5) Sugar was found on the still premises at the time of the seizure of the illicit still and arrest of Rodrigues and Woodworth (Transcript, p. 27).

(6) Woodworth called for the sugar on one occasion. Appellant had ordered the sugar that Woodworth picked up (Transcript, p. 35).

(7) Woodworth hauled sugar from the Independent Grocery on one occasion to the still premises. That was in the latter part of July. He went to the Independent Grocery and saw Earl Goon, and picked up some sacks of sugar and brought them out to the Hall Ranch (Transcript, p. 57).

(8) The witness Earl Goon read in the paper about a still being seized by the federal officers on the Hall Ranch, and a few days later appellant came to Goon and told him not to worry, it was just a routine matter (Transcript, pp. 34, 35).

(9) The witness Della Carrillo, in addition to testifying in relation to a still and statements made by the appellant relating to getting some of his men out of jail who were arrested in acts pertaining to "my still", testified that shortly before the trial of this case, that is the trial of the present case in which appellant and his two co-defendants were charged, Jehl

asked her if anyone had been to see her in regard to this case, and upon the witness answering in the affirmative Jehl said, "Remember you don't know anything" (Transcript, pp. 43, 44).

(10) The appellant testified in his own behalf, and among other things, in attempting to explain his proven connection with the purchase of sugar testified that in May of 1940 a Mr. Giorodoni entered his place of business in Watsonville, presenting a card from Louis Hirsh, an old friend of appellant's, Mr. Hirsh being a jeweler in Salinas and San Jose; that on the back of the card was appellant's name and address; that Giorodoni asked to be introduced to the Independent Grocery; that appellant introduced this man to Earl Goon; this man and Goon discussed the price of sugar; and that later Giorodoni called on appellant at the Colonial Inn at San Jose on several occasions and requested appellant to order, pay for, and purchase sugar in ten sack lots. Appellant was unable to give any further information relating to the mysterious Mr. Giorodoni (Transcript, pp. 77, 78, 79).

Louis Hirsh testified that he was engaged in the jewelry business in Salinas and knew the appellant for twelve or fifteen years; that he did not know a man by the name of Giorodoni; that he did not, during the month of April, May, or June, of 1940, give one of his business cards to a man by the name of Giorodoni to be delivered to appellant (Transcript, pp. 96, 97).

ARGUMENT.

The evidence proved that the illicit still, being the subject matter of the indictment, was operated by the defendants Rodrigues and Woodworth on the Hall Ranch, and further that in the operation of the still sugar was used; that the appellant, during the period of time the still was in operation, was engaged in purchasing sugar from Earl Goon, which sugar so purchased would be picked up in the evening by either the defendant Rodrigues or Woodworth. True, the evidence does not place the appellant at any time personally upon the still premises, but that the appellant participated in the operation of the still, with knowledge, to the extent of purchasing sugar for the same is definitely established by the fact that the appellant, following the seizure of the still and arrest of appellant's co-defendants at the Hall Ranch, *called upon Earl Goon and told Goon not to worry, that it was just a routine matter.* From this it is obvious that appellant had a guilty knowledge of his participation in the operation of the still on the Hall Ranch, otherwise the seizure of a certain illicit still and arrest of certain men for the operation of the same on the Hall Ranch would have meant no more to appellant than it would to anyone else who had no knowledge of the same.

Further, appellant's guilty knowledge and participation in the operations of the illicit still are established by the fact that appellant, in addition to talking to the witness Della Carrillo on two or three occasions relating to a still, again contacted the witness

Della Carrillo in the company of his two co-defendants shortly before the trial of their case, and inquired if anyone had been to see the witness, and upon the answer being in the affirmative appellant warned the witness to remember that she did not know anything. Certainly, it is respectfully submitted, the actions of appellant in this matter alone are sufficient to establish his guilt.

It must further be remembered, as heretofore stated, that the appellant took the stand and testified in his own behalf; that the trial Court and the jury were thus presented with the opportunity of observing the appellant, his manner of testifying, and his demeanor while on the stand, and no doubt the verdict of the jury was based in part upon such appearance of the appellant on the stand. That this is proper is well established by the case of *Quock Ting v. United States*, 140 U. S. 417, at 420, in which the Court said:

> "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity,

and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the record discloses substantial circumstantial evidence which required the submission of the case to the jury, and therefore it is respectfully submitted that a rehearing should be granted.

Dated, San Francisco,
May 20, 1942.

FRANK J. HENNESSY,
United States Attorney.
VALENTINE C. HAMMACK,
Assistant United States Attorney.
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify I am one of counsel of record for Appellee and Petitioner in the above-entitled cause, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that it is not interposed for delay.

Dated, San Francisco,
May 20, 1942.

VALENTINE C. HAMMACK,
Assistant United States Attorney,
Of Counsel for Appellee and Petitioner.